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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 18 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

GTE Telephone Operating Companies
GTOC Tariff FCC No. 1
GTOC Transmittal No. 1148

)
) CC Docket No. 98-79
)
)
)

OPPOSITION OF ICG TELECOM GROUP, INC.

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SUMMARY

The tariffing of GTE's proposed DSL service at the federal level presents the Commission with a host of potential issues to resolve under a very accelerated time line. Although the Commission is investigating whether or not the proposed DSL service should be tariffed at the federal level, the situation in the immediate proceeding is far more complicated and involves a number of intertwined issues of primary importance to both CLECs and the growing Internet community. A large part of the difficulty for the Commission in this proceeding concerns the consequences of whatever actions it takes, or does not take, rather than the mere jurisdictional determination.

The Commission should reject the tariff for GTE's proposed DSL service, which GTE itself states is intended for use by ISPs, because the service is an intrastate telecommunications service that allows an end user to call an ISP. The ISP, in turn, provides a separate information service to the caller. The only service in these transactions that could conceivably be labeled "interstate" is the Internet-related information service provided by the ISP. Since the 1996 Act, the Commission has reiterated that a local call to reach an end user ISP is different from the information service the ISP provides. There are two services at issue: (1) the local call to the ISP (which is an end user of the serving LECs' telecommunications service); and (2) the information service the ISP provides to its customer (which is not a regulated telecommunications service at all). In view of this Commission precedent and the reliance of parties upon it, it would be inconsistent and inequitable for the Commission to reverse its course at this juncture. Such a reversal would undermine the progress of local competition and send the wrong signal to the financial markets.

Contrary to the premise of its Direct Case, GTE's proposed DSL service does not qualify as an exchange access service because it is a point-to-point communication within the same state, and because the service fails to provide access to a point of presence ("POP") of an IXC. Instead, under the Commission's "two services" analysis, as explained above, callers will use the DSL service to reach an ISP's platform. The ISP, in turn, will provide an information

service to the caller. Under the Commission's current rules, ISPs are treated as end users of telecommunications services, not as IXC's. Therefore, it would be inconsistent with Commission policy exempting ISPs (as end users) from access charges to classify as "exchange access" a service that GTE admits is for end users. The Commission should reject GTE's DSL tariff as improperly filed at the federal level, even if the Commission finds that the traffic is "interstate" because it is intertwined with what may sometimes be an interstate information service.

There is an important competitive consideration at stake in this proceeding, apart from where GTE may file its tariff, if the Commission finds that GTE's DSL traffic is interstate. Because exchange access traffic is currently excluded from reciprocal compensation arrangements under Section 51.701 of the Commission's rules and the rules of many states, most reciprocal compensation agreements expressly exclude "access" traffic. If the Commission were to find in this proceeding that DSL traffic is exchange access traffic, the ILECs would likely argue to the states that *all* calls to ISPs, including "dial-up" calls, are interstate in nature and therefore "access." This argument would be the cornerstone of ILEC efforts to relitigate the 21 state decisions that require ILECs to pay other LECs' reciprocal compensation for calls to ISPs. In addition, if the Commission were to find that GTE's DSL traffic constitutes exchange access, DSL traffic would be exempted from the Act's interconnection requirements. These potential collateral consequence of the Commission's actions in this proceeding would effectively turn the clock back on local competition. The Commission can preclude these effects on competition by finding – consistent with the Act and FCC rules – that GTE's DSL service involves exchange traffic, not exchange access.

No matter what the Commission's finding is with regard to the jurisdictional nature of GTE's DSL service, the Commission must make clear its policy on a number of related issues. For example, the Commission should clarify that any conclusion on the jurisdictional nature of GTE's DSL traffic has no bearing whatsoever on the jurisdictional nature of circuit-switched traffic. Under this approach, the Commission would make no new determination

about “dial-up” calls to the local ISP platform by callers. Its ruling on GTE’s DSL traffic should be limited in recognition of the states’ historical and continuing role in regulating local, circuit-switched traffic.

While ICG believes that the Commission should clarify that it is taking no action concerning reciprocal compensation, should the Commission find it necessary to discuss at all issues such as reciprocal compensation for “dial-up” calls to ISPs, it has the option of allowing the states to address these compensation issues pursuant to their Section 252 authority over interconnection agreements.

If the Commission chooses to resolve reciprocal compensation issues itself, it should signal its intention to explore all compensation issues in a full rulemaking proceeding. The Commission should not make any attempt to address such issues in the narrow context of a tariff investigation proceeding, which does not provide the means for a thorough examination and broad public participation, especially when the Commission must act by October 28, 1998 – a mere six weeks away. Even GTE concedes that it is not necessary for the Commission to resolve reciprocal compensation issues in this proceeding.

Whatever choice the Commission makes about who will resolve reciprocal compensation issues for circuit switched “dial-up” traffic to ISPs, the Commission should clarify that no action taken in the DSL tariff investigation upsets any determinations by the states in interpreting provisions of interconnection agreements or resolving issues arbitrated by parties. The Commission should also make clear that it has no intention of *ever* examining such decisions by the states. The decisions by the state commissions interpreted provisions of interconnection agreements or resolved disputes in arbitration proceedings, consistent with state authority under Section 252 of the Act.

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GTOC Transmittal No. 1148)	

OPPOSITION OF ICG TELECOM GROUP, INC.

Pursuant to the Commission's Public Notice, released August 20, 1998, ICG Telecom Group, Inc. ("ICG") hereby respectfully submits its opposition to the direct case of GTE Service Corporation ("GTE") in the Commission's investigation of GTE's tariff for digital subscriber line ("DSL") service, which GTE states will be used primarily by end user information service providers ("ISPs"). The Commission sought comment on the appropriate jurisdictional nature of GTE's service.¹

ICG, as the largest "facilities-based" competitive local exchange carrier ("CLEC") that is not affiliated with a major interexchange carrier ("IXC"), has an interest in these proceedings. ICG is a leading national CLEC with extensive fiber-optic networks. ICG offers local, long distance and enhanced telephony and data services in the states of California and Colorado, as well as the Ohio Valley and most of the Southeastern United States.

On January 22, 1998, ICG merged with NETCOM On-Line Communication Services, Inc. ("NETCOM"). NETCOM is one of the leading ISPs in the country, and as

¹ ICG notes that while this opposition specifically concerns GTE's DSL tariff, the arguments made herein apply equally to the Commission's investigations of the DSL tariffs filed by Pacific Bell (CC Docket No. 98-103), BellSouth (CC Docket No. 98-161), and Bell Atlantic (CC Docket No. 98-168). For this reason, ICG is filing copies of this opposition in those respective dockets.

of December 31, 1997, was providing service to approximately 540,000 customers and over 12,000 professional businesses.

* * *

The tariffing of GTE's proposed DSL service at the federal level presents the Commission with a host of potential issues to resolve under a very accelerated time line. Because of the speed at which it must conduct its investigation, even if the sole issue to be resolved was whether or not the proposed DSL service should be tariffed at the federal level, the Commission's resources and expertise would be taxed. The situation in the immediate proceeding, however, is far more complicated and involves a number of intertwined issues of primary importance to both CLECs and the growing Internet community. A large part of the difficulty for the Commission in this proceeding concerns the consequences of whatever actions it takes, or does not take, rather than the mere jurisdictional determination. The Commission's actions (or inaction) could significantly affect the provision of advanced data services in the months and years ahead as well as affect the growth of local competition.

Because GTE's DSL tariff involves an intrastate service that is not properly tariffed at the federal level, rejecting GTE's tariff on these grounds is the cleanest alternative. Rejection of GTE's tariff would avoid the need for the Commission to make a series of snap decisions in the context of a relatively narrow and focused proceeding about DSL traffic. The Commission would also be freed of the necessity of weighing the potential collateral consequences on reciprocal compensation for "dial-up" calls to ISPs, and on the Commission's ability to control the proliferation of advanced data capabilities.

On the other hand, should the Commission elect to allow the tariffs to remain in effect, its task is more intricate. The Commission must be cognizant not only of the

jurisdictional determination it intends to make, it must also (1) consider how the consequences of this determination will affect other related issues pending before the Commission and the states, and (2) so as to avoid any collateral consequences, make clear what it is *not* doing in this proceeding. The slightest ambiguity in any of the Commission's analysis will likely lead to further stonewalling by the incumbent LECs and foster further litigation of interconnection issues at the state level, all of which will delay the advent of vibrant local competition and the widespread availability of advanced services.

I. THE COMMISSION SHOULD REJECT GTE'S DSL SERVICE TARIFF BECAUSE IT IS AN INTRASTATE SERVICE.

The Commission should reject the tariff for GTE's proposed DSL service, which GTE itself states is intended for use by ISPs,² because the service is an intrastate telecommunications service that allows an end user to call an ISP. The ISP, in turn, provides a separate information service to the caller. The only service in these transactions that could conceivably be labeled "interstate" is the Internet-related information service provided by the ISP.

GTE goes to great lengths to play up the "interstate" and "international" character of the Internet. GTE depicts the Internet as a "global medium of communications" that "involves multiple parties throughout the nation and around the world, sometimes simultaneously, rendering traditional jurisdictional measures meaningless."³ Whether these statements are accurate or not, they misinform the jurisdictional analysis. The Commission has consistently held that the jurisdictional nature of the information service provided by an ISP -- even if it can be labeled "interstate" -- is

² GTE Direct Case at 4.

³ *Id.* at 15.

irrelevant to the jurisdictional classification of the telecommunications service that links the end user with the ISP platform.

Since the 1996 Act, the Commission has reiterated that a local call to reach an end user ISP is different from the information service the ISP provides:

When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the internet service provider's service offering.⁴

There are two services at issue: (1) the local call to the ISP (which is an end user of the serving LECs' telecommunications service); and (2) the information service the ISP provides to its customer (which is not a regulated telecommunications service at all). Although the Commission uses a "two components" terminology, its statements on Internet traffic reflects the "two-services" approach:

We agree with the Joint Board's determination that internet access consists of more than one component. Specifically, we recognize that internet access includes a network transmission component, which is the connection over the LEC network from a subscriber to an [ISP] provider, in addition to the underlying information service.⁵

The Commission has determined that the first service or "component," i.e. the connection between the ISP's customer and the ISP platform, is a local call subject to local, intrastate tariffs:

ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line

⁴ In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, at para. 789.

⁵ Id. at para. 83 (emphasis added).

rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.⁶

Likewise, the Commission has found that the first “component” is to be treated as local traffic under the Commission’s separations rules:

ESP traffic over local business lines is classified as local traffic for separations purposes, with the result that [traffic sensitive] costs associated with ESP traffic are apportioned to the intrastate jurisdiction, and are recovered through intrastate charges paid by ESPs and other purchasers of intrastate services.⁷

In the Access Charge Reform Order, the Commission unambiguously characterized the connection from the end user to the ISP as local traffic: “To maximize the number of subscribers that can reach them through a local call[,]” most ISPs have deployed points of presence in local calling areas.⁸ The United States Court of Appeals for the Eighth Circuit recently concurred when it rejected the claim that ISPs use the network in the same manner as interexchange carriers (“IXCs”):

ISPs subscribe to LEC facilities in order to receive local calls from customers who want access to the ISP’s data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.⁹

⁶ In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order, at para. 342.

⁷ Amendments to Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, at para. 34.

⁸ In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order (emphasis added).

⁹ Southwestern Bell Telephone Co. v. FCC, 97-2618, slip opinion at 39, n. 9 (released August 19, 1998).

Finally, in the Advanced Data Services Order, the Commission made clear that the local telecommunications service includes advanced data service, such as that offered through GTE's DSL tariff:

An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.¹⁰

In view of the weight of this Commission precedent and the reliance of parties upon it, it would be inconsistent and inequitable for the Commission to reverse its course at this juncture. Such a reversal would undermine the progress of local competition and send the wrong signal to the financial markets. Moreover, in rejecting federal tariffing of GTE's DSL service, the Commission need not be concerned that it will preclude such service offerings. A number of incumbent local exchange carriers ("ILECs") have already tariffed advanced data services at the state level, which ensures the continued availability of these services. In addition, CLECs are continuing to lead the way in deploying advanced data services throughout the country.

¹⁰ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 (released August 7, 1998) ("Advanced Data Services Order") at para. 36 (emphasis added).

II. GTE's DSL SERVICE IS IMPROPERLY TARIFFED AT THE COMMISSION BECAUSE IT DOES NOT INVOLVE EXCHANGE ACCESS SERVICE.

A. Even if the Commission Finds that GTE's DSL Service is Interstate, the Service Does Not Constitute Exchange Access Service.

Contrary to the premise of its Direct Case, GTE's proposed DSL service does not qualify as an exchange access service.¹¹ For this reason as well, the Commission should reject GTE's DSL tariff as improperly filed at the federal level, even if the Commission finds that the traffic is "interstate" because it is intertwined with what may sometimes be an interstate information service.

GTE's DSL traffic is clearly not exchange access under the Act and the Commission's rules. Section 147(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone *toll* services."¹² GTE's DSL service does not involve telephone toll service.

GTE's proposed DSL service also fails to qualify as a Part 69 exchange access tariff both because it is a point-to-point communication within the same state, and because the service fails to provide access to a point of presence ("POP") of an IXC. Instead, under the Commission's "two services" analysis, as explained above, callers will use the DSL service to reach an ISP's platform. The ISP, in turn, will provide an information service to

¹¹ Although ICG argued earlier that the "cleanest" approach to resolving this proceeding would be to reject the tariff because it involves an intrastate service, the Commission also has the option, of declining to reach the issue of the jurisdictional nature of DSL traffic by simply rejecting the tariff because it is not an exchange access service, as represented by GTE.

¹² 47 U.S.C. Section 147(16) (emphasis added).

the caller. GTE itself notes that its DSL service will be “most commonly used by Internet service providers” that are interconnected to GTE.¹³ Under the Commission’s current rules, ISPs are treated as end users of telecommunications services, not as IXC’s. Therefore, it would be inconsistent with Commission policy exempting ISPs (as end users) from access charges to classify as “exchange access” a service that GTE admits is for end users.

In addition, Section 69.2 of the Commission’s rules defines “access service” as involving “interstate or foreign telecommunication.” No such “interstate *telecommunication*” is associated with GTE’s DSL calls, no matter how one classifies the information service provided by the ISP.

The Commission has had cause to clarify recently, in the Advanced Data Services Order, that “advanced services” are a departure from traditional exchange access services:

To the extent that advanced services are exchange access services, we believe that advanced services are fundamentally different from the exchange access services that the Commission referenced in the Local Competition Order and concluded were not subject to section 251(c)(4) [resale requirements]. We expect that advanced services will be offered predominantly to residential or business users or to Internet service providers. None of these purchasers are telecommunications carriers.¹⁴

Therefore, the Commission should continue to recognize that *advanced services are not exchange access services*.

There is an important competitive consideration at stake, apart from where GTE may file its tariff, if the Commission finds that GTE’s DSL traffic is interstate. Because

¹³ GTE Direct Case at 4.

¹⁴ Advanced Data Services Order at para. 61. The Commission tentatively concluded that “advanced services marketed by incumbent LECs generally to residential or business users or to Internet service providers should be deemed subject to the section 251(c)(4) resale obligation, without regard to their classification as telephone exchange service or exchange access.” *Id.* at para. 189.

exchange access traffic is currently excluded from reciprocal compensation arrangements under Section 51.701 of the Commission's rules and the rules of many states, most reciprocal compensation agreements expressly exclude "access" traffic. If the Commission were to find in this proceeding that DSL traffic is exchange access traffic, the ILECs would likely argue to the states that *all* calls to ISPs, including "dial-up" calls, are interstate in nature and therefore "access." This argument would be the cornerstone of ILEC efforts to relitigate the 21 state decisions that require ILECs to pay other LECs' reciprocal compensation for calls to ISPs. In addition, if the Commission were to find that GTE's DSL traffic constitutes exchange access, DSL traffic would be exempted from the Act's interconnection requirements. These potential collateral consequence of the Commission's actions in this proceeding would effectively turn the clock back on local competition. The Commission can preclude these effects on competition by finding – consistent with the Act and FCC rules – that GTE's DSL service involves exchange traffic, not exchange access.

If the Commission finds that DSL calls to ISPs constitutes an interstate service, the Commission should also expressly state that this finding should not apply to certain intrastate aspects of GTE's DSL tariff. For example, the POTS portion of GTE's DSL service remains an intrastate service that is within the jurisdiction of the states. The POTS and broadband services are not mixed in such a way that precludes state jurisdiction over the non-broadband aspects of the service offering. In addition, a finding by the Commission on the broadband portion of the DSL service should have no application to corporate intranet traffic, especially since such calls are almost always intrastate.

B. Even Under Exchange Access Analysis, GTE's Tariff for DSL Service Should Be Rejected.

The Commission should reject GTE's DSL tariff even if the Commission elects to apply an exchange access analysis. Under such an analysis, GTE's proposed DSL service

would still be considered *intrastate*. With switched access, the jurisdictional nature of the traffic is determined by where the communications service originates and where it terminates. If these points are in the same state, the access is an *intrastate* service. If they are in different states, the access is an *interstate* service. Because ISPs normally interconnect with ILECs in the same LATA, the traffic carried by the ILEC's DSL service is intrastate when analyzed using the switched access test.¹⁵ In the instant situation, using the switched access test, when an end user uses GTE's DSL service to reach the ISP, the communications service originates at the end user's premises and terminates at the ISP's intrastate platform. Once the call terminates at the ISP platform, the ISP then provides an information service.

With special access, the test is the same when the facility carries a single broadband call. When the facility carries multiple calls, the Commission has required that the facilities are to be treated as interstate only when 10% of the individual calls are interstate. Even under this analysis, since every telecommunications service terminates at the intrastate ISP platform, the traffic would be *intrastate*. In sum, even if the traffic is found to be exchange access (whether switched or special), the traffic cannot be federally tariffed under the "two services" test, because the traffic is intrastate.

III. WHATEVER DETERMINATION THE COMMISSION MAKES WITH REGARD TO GTE'S DSL SERVICE, IT MUST MAKE CLEAR THAT ITS FINDING HAS LIMITED APPLICABILITY.

No matter what the Commission's finding is with regard to the jurisdictional nature of GTE's DSL service, the Commission must make clear its policy on a number of related issues. Without express policy statements on these issues, as outlined below, the

¹⁵ If the ISP chose to interconnect in a different state, the ILEC's proposed service would be interstate under a switched access jurisdictional test.

CLECs will have to engage in costly, prolonged litigation, or be left to the mercy of the ILECs who will insist on interpreting every conceivable ambiguity to their advantage.

A. The Commission Should Ensure that No Collateral Consequences of its Finding are Visited on Circuit-Switched Traffic and Associated Compensation Issues.

The Commission should clarify that any conclusion on the jurisdictional nature of GTE's DSL traffic has no bearing whatsoever on the jurisdictional nature of circuit-switched traffic. Under this approach, the Commission would make no new determination about "dial-up" calls to the local ISP platform by callers. Its ruling on GTE's DSL traffic should be limited in recognition of the states' historical and continuing role in regulating local, circuit-switched traffic. Failure by the Commission to rule out applying its ruling to dial-up calls to ISPs will likely lead to confusion and uncertainty in state proceedings about the extent of the Commission's findings.

While ICG believes, as stated above, that the Commission should clarify that it is taking no action concerning reciprocal compensation, should the Commission find it necessary to address at all issues such as reciprocal compensation for "dial-up" calls to ISPs, it has the option of allowing the states to address these compensation issues pursuant to their Section 252 authority over interconnection agreements.

If the Commission chooses to resolve reciprocal compensation issues itself, it should signal its intention to explore all compensation issues in a full rulemaking proceeding. The Commission should not make any attempt to address such issues in the narrow context of a tariff investigation proceeding, which does not provide the means for a thorough examination and broad public participation, especially when the Commission must act by October 28, 1998 – a mere six weeks away. Even GTE concedes that it is not necessary for the Commission to resolve reciprocal compensation issues in this proceeding.

By initiating a rulemaking, the Commission would acknowledge the concerns of the states about their role in regulating calls to ISPs. Just two months ago, the National Association of Regulatory Utility Commissioners (“NARUC”) adopted two resolutions that call for close federal-state coordination on two matters that are likely to be implicated by the instant proceeding – reciprocal compensation for local calls to ISPs and the jurisdictional nature of advanced data services. A full rulemaking would allow the Commission to act in a forum where the collaborative approach requested by the states for these issues would be followed in a meaningful way.

B. The Commission Should Clarify That It Has No Intention of Examining or Upsetting Existing Determinations of the State Commissions.

Whatever choice the Commission makes about who will resolve reciprocal compensation issues for circuit switched “dial-up” traffic to ISPs, the Commission should clarify that no action taken in the DSL tariff investigation upsets any determinations by the states in interpreting provisions of interconnection agreements or resolving issues arbitrated by parties. The Commission should also make clear that it has no intention of *ever* examining such decisions by the states. The decisions by the state commissions interpreted provisions of interconnection agreements or resolved disputes in arbitration proceedings, consistent with state authority under Section 252 of the Act. The Commission should not be in the position of modifying agreements entered into by the parties.

The need to respect existing state law determinations is particularly apparent in the area of reciprocal compensation for calls to ISPs. Twenty-one (21) states have already examined the issue of reciprocal compensation for calls to ISPs. In addition, as discussed above, NARUC has recently adopted a second resolution in less than a year asking the FCC to coordinate with the states before taking any action on this issue. Therefore, to the

extent that the Commission chooses to make any ruling on reciprocal compensation for calls to ISPs, any such action should be made prospective only, with a continuing role for the states in regulating the details, such as end user rates and carrier-to-carrier compensation.

For all of the reasons discussed above, the Commission should reject GTE's DSL tariff. The Commission's decision should state explicitly the effect of any action that it takes on related issues before the FCC or the states in accordance with the forgoing.

Respectfully submitted,



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Dated: September 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 1998, a copy of the foregoing Opposition of the ICG Telecom Group, Inc. was sent by first class United States mail, postage prepaid, to the following:

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